

DATED : 5th APRIL, 2006.

Oral Judgment :

1. The appellant has challenged the order of the 4th Additional District Judge, Kolhapur in Miscellaneous Civil Application No.129 of 1999 dated 2.11.2000 rejecting his application for the custody of his minor son Tushar under section 8 of the Guardians and Wards Act, 1890.

2. The facts about which there is no dispute is that the marriage of the appellant was solemnized with Suvarna, the daughter of the respondent, on 15.5.1996. Out of the said wedlock Tushar was born on 27.8.1997. Suvarna died on 18.11.1998 in mysterious circumstances when Tushar was only 15 months old.

3. On 27.11.1998 the respondent moved Miscellaneous Criminal Application No.119 of 1998 under section 97 of the Code of Criminal Procedure and obtained search warrant for Tushar from the Judicial Magistrate, First Class, Panhala. The custody of Tushar was given to

the respondent. The present appellant preferred Criminal Revision No.271 of 1998 against the order of the Judicial Magistrate First Class, Panhala. However the revision application was dismissed by the Additional Sessions Judge, Kolhapur on 26.2.1999. The respondent preferred Criminal Writ Petition No.369 of 1999 against the said order. This court rejected the said writ petition by order dated 12.4.1999.

4. On or about 29.4.1999 the respondent, as guardian of minor Tushar, instituted Regular Civil Suit No.76 of 1999 against the appellant and his father praying for perpetual injunction restraining them from alienating the ancestral property of Tushar. On 6.5.1999 the respondent moved Misc. Criminal Application No.24 of 1999 under section 125 of the Code of Criminal Procedure for grant of maintenance allowance of Rs.500/- per month for Tushar.

5. On 29.6.1999 the appellant moved the present application for custody of his minor son Tushar under

section 8 of the Guardians and Wards Act, 1890. According to the appellant he is the only son of his father and his parents love Tushar very much. The appellant is serving as [I.T.I.](#) professional with Ghatge Patil Industries Limited at Kolhapur. The appellant does up and down from his place Kodoli (Warna) which is industrially developed by Warna Industrial Group. The educational and medical facilities are available there. The appellant is financially sound and can look after the welfare of his son Tushar. On the other hand, the respondent is uneducated agriculturist and resides at village Khutalwadi which is a remote place and where medical and educational facilities are not available. The respondent is not paying proper attention towards the welfare of Tushar. The appellant, therefore, prayed for custody of Tushar.

6. The respondent resisted the application by filing written statement. According to the respondent, the appellant used to ask his wife Suvarna to bring money

from her father for purchase of a Maruti Van and used to harass her for his illegal demand. Because of the said harassment Suvarna committed suicide on 18.11.1998. Crime No.56/98 was registered against the appellant and his family members under sections 498-A, 304(B) r/w 34 of the Indian Penal Code. The appellant and others were arrested in connection with the said offence and they were subsequently released on bail and were tried.

7. According to the respondent, Suvarna was his only daughter. The appellant has moved the application for custody of Tushar only with a view to counter blast the civil suit and miscellaneous criminal application under section 125 of the Code of Criminal Procedure made by the respondent on behalf of Tushar. The respondent further submitted that the appellant re-married and is residing with his second wife. Thus there is danger to the life of Tushar at the house of the appellant. The respondent further submitted that he has got two sons who

are taking education. Village Khutalwadi is situated on Kolhapur – Ratnagiri State highway and Ratnagiri–Hyderabad National Highway at a distance of 1 k.m. From village Bambavade. In fact, Khutalwadi and Bambavade have become one and the same. Educational as well as medical facilities are available there. The respondent is a progressive agriculturist and he is the wholesale dealer of Tamrind. He, his wife and sons look after the upkeepment of Tushar. The application moved by the appellant is malafide and the same is liable to be dismissed.

8. The appellant examined himself in support of the application whereas the respondent examined himself and five witnesses in support of his contentions. After considering the oral and documentary evidence and after verifying the inclination of minor Tushar, the learned trial Judge held that the appellant is not entitled to the custody of Tushar. He, therefore, dismissed the application. The said dismissal has been challenged by the appellant.

9. I have heard Mr. Dilip Taur, Advocate for the appellant and Mr. P.D. Dalvi, advocate for the respondent. I have also gone through the record and proceedings of the case with the assistance of the learned counsel for the parties.

10. The only point that arises for determination is whether it is for the welfare of minor Tushar to hand over his custody to the appellant. My finding is in the negative.

- R E A S O N S -

11. The appellant being the father of minor Tushar is his natural guardian. The respondent is the maternal grandfather of minor Tushar. Ordinarily the natural guardian should be appointed as guardian for the person of the minor under the Guardian and Wards Act, 1890. It is only when the natural guardian is found to be unfit or his interests are against the interest of the minor or in very exceptional circumstances, a person other than a natural guardian should be appointed guardian for the person of

the minor.

12. In the present case the appellant has been acquitted of the offences punishable under sections 498-A, 304(B) r/w 34 of the Indian Penal Code for unnatural death of his wife Suvarna. At the time of the death of Suvarna, Tushar was only 15 months old. When the appellant and his relatives were arrested by the police the respondent applied for search warrant and obtained the custody of minor Tushar. Hence it cannot be said that the respondent obtained the custody of minor Tushar illegally. Since then Tushar is residing with the respondent. At present Tushar is about 8-1/2 years old and is taking education. The evidence on record shows that the respondent and his wife are educated though they cannot be said to be highly educated. The respondent has got two sons who are taking education. The respondent is the wholesale dealer of Tamarind and is in position to maintain Tushar though Tushar has applied for maintenance allowance under

section 125 of the Code of Criminal Procedure from the appellant. The evidence on record shows that adequate educational and medical facilities are available at the place of the respondent.

13. The appellant is in service and is earning. He has got his parents and he is also anxious to spend for the better future of his son Tushar. However, during the pendency of the proceedings, the appellant re-married and out of the second marriage, he has got a daughter. His second wife and daughter are residing with him. In these circumstances in my opinion it would not be proper to hand over the custody of minor Tushar to the appellant though he is natural guardian of Tushar. The presence of step-mother of Tushar cannot be neglected.

14. Mr. Dilip Taur, the learned counsel for the appellant, vehemently urged that the remarriage of the appellant cannot be a ground for rejecting his claim for the custody of his minor son. In support of his submission he

heavily relied on two cases :

- (i) Wahidunissa Begum w/o Abdul Wahid and another .vrs. Shaikh Abdulla s/o Sk. Maheboob,
2000(1) Mh.L.J. 136.
- (ii) Keshav s/o Ganpatrao Hedau .vrs. Damodhar s/o Udaramji Kandrikar and another,
2004(4) Mh.L.J. 1104.

15. On facts the case of Wahidunissa is different because in that case Shaikh Abdulla had a daughter Salma and a son Sajid (Sk. Muddassar) from his wife Nazmunissa, who died of burn injuries at her matrimonial house. Thereafter daughter Salma continued to reside with her father and even was staying with her father and step mother right from the beginning, whereas Sajid (Sk. Muddassar) was in the custody of his maternal grandmother. Shaikh Abdulla was serving as a Lecturer and after his acquittal he was continued in the service. Secondly Shaikh Abdulla was residing in Nanded city

whereas the maternal grandmother of the minor was residing at village Dharmabad. In those circumstances, the court thought it better that the welfare of the child would require that he should stay with his father. In the present case minor Tushar has no real sister but he will have to reside with his step-mother and step-sister, in case the custody is handed over to the appellant.

16. In the second case the minor namely Rohit was residing with his natural mother who remarried and was residing with her second husband along with Rohit in Amravati city. In these circumstances the court held that second marriage does not disentitle the mother to act as guardian of the minor in preference to the paternal grandfather.

17. Thus both the cases relied upon by the learned counsel for the appellant are distinguishable on facts and would not help the cause of the appellant.

18. I find that the trial Court has properly considered

the evidence on record and has come to the conclusion that the appellant is not entitled for the custody of the minor. I find no reason to disagree with the findings of the learned trial Judge. Of course, the appellant may apply for the custody of Tushar in case of change in circumstances like death of the respondent before attaining majority by Tushar. Hence, I pass the following order :

19. The appeal is dismissed with costs.

(K. J. Rohee, J.)

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